SUPREME COURT, U. S.

APR 10 1970

JOHN F. DAVIS, CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 83

GARRETT H. BYRNE, as he is the duly elected District Attorney for Suffolk County, City of Boston, Commonwealth of Massachusetts, and ROBERT H. QUINN, Attorney General of the Commonwealth of Massachusetts,

APPELLANTS,

v.

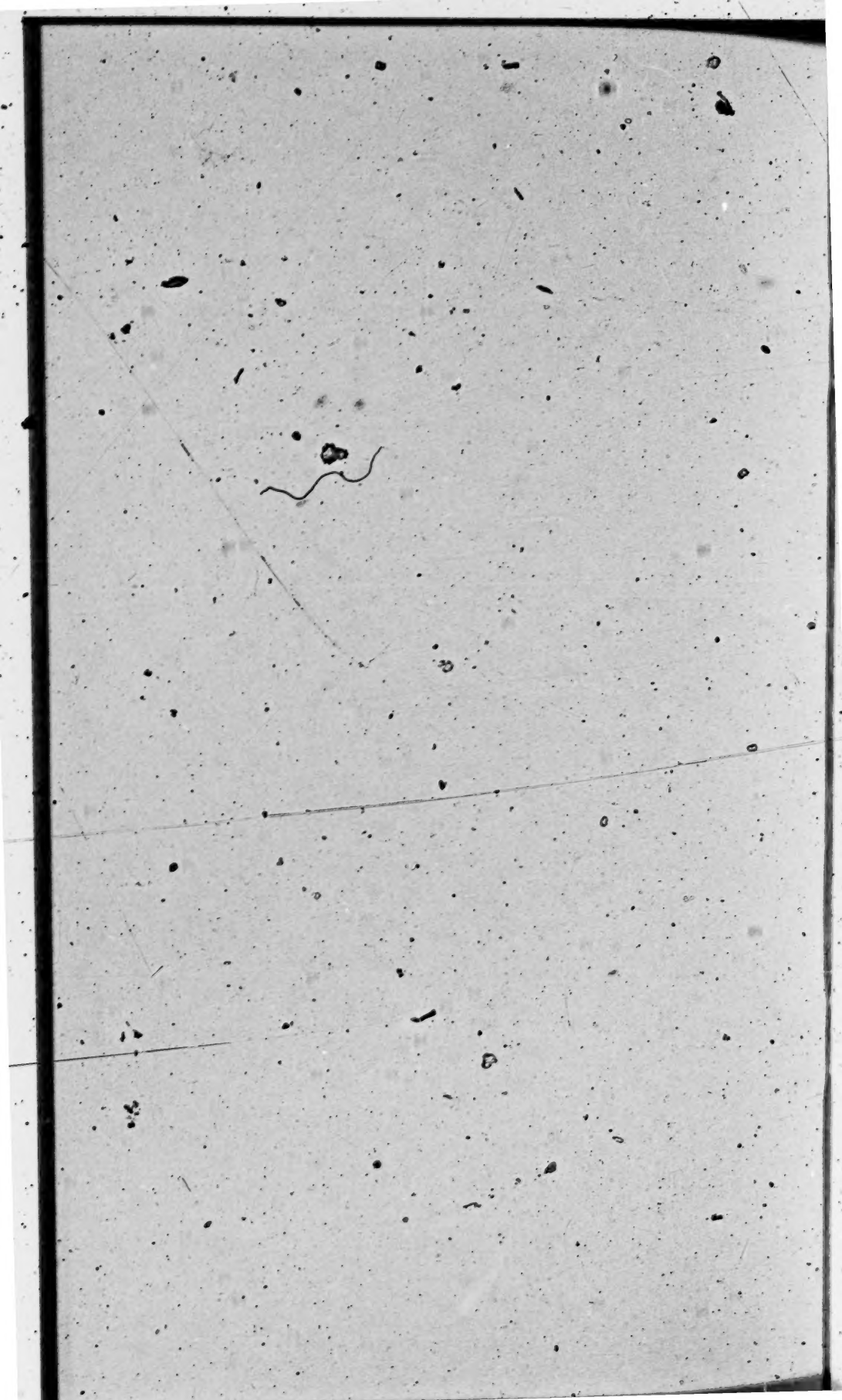
SERAFIM KARALEXIS, JAMES VLAMOS, SYMPHONY CINEMA II, INC., and FILM DISTRIBUTORS, INC., all of 252 Huntington Avenue, Boston, Massachusetts,

APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

APPEAL DOCKETED FEBRUARY 4, 1970
JURISDICTION NOTED MARCH 23, 1970

Blanchard Press, Inc., Boston, Mass. — Law Printers



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DOCKET ENTRIES

	Proceedings
1969	
June 16	Complaint filed.
	Motion for Temporary Restraining Order, filed.
	Memorandum of Points and Authorities in Support of Motion for Temporary Restraining Order, filed.
	Brief in Support of Complaint of the Plaintiff's filed.
	Notice of Motion in Accordance with Rule 65(a) of FRCP, filed.
17	Motion to amend complaint, filed. Appearance of Ruth Abrams, Esq., filed.
17	Amended complaint, filed. Appearance of Theodore A. Glynn, Jr., Esq., filed.
17	JULIAN, D.J. Motion to amend complaint, granted.
19	ALDRICH, Ch.J. Court of Appeals, JULIAN, D.J. & PETTINE, D. J. Hearing regarding issuance of Preliminary Injunction . . . Arguments by counsel . . . Advisement.
23	Motion to File and Amendment to Amended Complaint; and to File a Supplementary Brief, filed.
24	ALDRICH, CIRCUIT JUDGE, JULIAN, D. J., & PETTINE, D. J. Ruling on Plaintiff's Application for a Preliminary Injunction. . . . We shall issue a temporary injunction restraining the prosecution of the state court proceedings pending further order of this court other than for the purpose of considering and deciding pending or new

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motions to dismiss, and pending or new motions to suppress evidence. Copies given in hand to Atty Theodore Glynn, Jr., Ruth Abrahms, and Atty Herbert Swartz on June 24, 969. (filed on June 24, 1969 at 1:03 PM)

24 ALDRICH, CIRCUIT JUDGE, JULIAN, D. J., & PETTINE, D. J., TEMPORARY INJUNCTION. . . . District Attorney . . . is restrained from prosecuting the indictments pending against plaintiffs deciding pending or new motions to dismiss, and . . . other than for the purpose of considering and deciding pending or new motions to dismiss, and pending or new motions to suppress evidence. Copies given in hand to Att. Theodore Glynn, Jr., Ruth Abrahms, and Atty Herbert Swartz on June 24, 1969. (filed on June 24, 1969 at 1.03 PM)

24 ALDRICH, CIRCUIT JUDGE, The Honorable Bailey Aldrich, Chief Judge, United States Court of Appeals for the First Circuit, and the Honorable Raymond J. Pettine, United States District Judge for the District of Rhode Island, to sit with the Honorable Anthony Julian, United States District Judge for the District of Massachusetts, in the three-judge court as required by 28 U.S.C. 2281.

30 Plaintiffs' motion to file an amendment to amended complaint—II (following dismissal of original indictments in Suffolk Superior Court), filed.

30 Amendment to amended complaint—II, filed. Copies mailed to Hon. Bailey Aldrich and Hon. Raymond J. Pettine.

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July 9 Brief of the Plaintiff following the second set of indictments, filed. Copies to Three Judges.

11 Addendum to the brief of the plaintiff following issuance of the second set of indictments, filed. Copies to Honorable Bailey Aldrich, Anthony Julian, and Raymond J. Pettine mailed.

14 Motion of Grove Press, Inc. to intervene as a plaintiff, filed with Intervenor's Complaint attached thereto.

14 Appearance of Alan Dershowitz, Esq., for intervenor, filed.

14 ALDRICH, CH. Cir Judge, JULIAN, J. & PETTINE, J. Hearing on Motion to amend complaint. Arguments. Advisement.

July 15 Aldrich, Cir. Judge, Julian, J. and Pettine, J. MEMORANDUM AND RULINGS ON MOTION TO FURTHER AMEND COMPLAINT, ON MOTION TO INTERVENE, AND ON MOTION FOR PRELIMINARY INJUNCTION, filed.
Copy mailed to Messrs. Swartz, Roberts, Dershowitz, Glynn, Jr. and Abrams.

July 29 Transcript of hearing of Monday, July 14, 1969, filed.

31 Letter to Clerk, dated July 30, 1969, from Herbert S. Swartz, Esq. re briefs.

Sept. 16 Letter to Clerk, dated Sept. 15, 1969, from Herbert S. Swartz, Esq., advising that as of this date no decision has as yet been rendered by Judge Tauro.

Nov. 5 Brief of amicus, Grove Press, Inc., filed. Copy to Judge Aldrich and Judge Pettine.

12 THREE JUDGE COURT—Hearing on restraining order; advisement. Rulings and Findings of Chief Justice Tauro, filed.

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14 Appearance of Lawrence P. Cohen, Asst Atty General, filed.

20 Defendant's motion for abstention, filed.

20 Memorandum in support of defendant's motion for abstention, filed

21 THREE JUDGE COURT—Hearing on motion for preliminary injunction; arguments; advisement.

28 ALDRICH, CH. J. OPINION filed . . . "the injunction will not issue for one week, to permit plaintiffs to add other parties, if so advised, and to give the defendant the opportunity to apply to the Circuit Justice for a stay."

28 JULIAN, J. DISSENTING OPINION filed . . . "In my opinion the position taken by the majority of this Court is legally unsound and inimical to the public interest. I must therefore dissent.

28 Copies of opinions delivered to counsel in hand.

Dec. 1 Appearance of Louis M. Nordlinger, Esq., for defendant, filed.

1 Motion of plaintiffs to add parties defendant, Robert Quinn, Attorney General, filed.

1 Motion of Grove Press, Inc. to enter as party plaintiff, filed.

2 Notice of appeal filed. Copies to Messrs. Swartz, Roberts & Dershowitz.

5 Consent and opposition to plaintiff's motion to add parties defendants, filed.

6 ALDRICH, CH. J. Order adding Robert H. Quinn, Attorney General of the Commonwealth of Massachusetts, as a party defendant, entered.

6 ALDRICH, CH. J. and PETTINE, D. J. INJUNCTION entered. Copies to counsel.

6 ALDRICH, CH. J. On motion of the defendants the temporary injunction pending a decision on

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the merits entered this day stayed pending defendants' request to the Supreme Court for a stay pending their appeal from the issuance of said injunction.

9 Appearance of Lawrence P. Cohen, Esq., for deft Robert H. Quinn, filed.

Dec. 10 Motion of plaintiffs to add Alan M. Brunner and Campus Cinema, Inc. as parties plaintiffs, filed.

11 Amended motion of the plaintiffs to add parties plaintiffs and party defendant, filed.

15 Opposition of defendants to motion of plaintiffs to add parties, filed.

16 Stenographic record of proceedings on Nov. 12, 1969, filed.

Stenographic record of proceedings on Nov. 21, 1969, filed.

24 Deft's supplemental notice of appeal filed. Copies to Messrs. Swartz, Roberts and Dershowitz.

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Jan. 7 Original pleadings in one volume sent to the Supreme Court by certified mail. (No. 170170)

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

Civil Action 69-665-J

SERAFIM KARALEXIS, JAMES VLAMOS, SYMPHONY CINEMA II, INC., AND FILM DISTRIBUTORS, INC., ALL OF 252 HUNTINGTON AVENUE, BOSTON, MASSACHUSETTS,

PLAINTIFFS,

v.

GARRETT BYRNE, AS HE IS THE DULY ELECTED DISTRICT ATTORNEY FOR SUFFOLK COUNTY, CITY OF BOSTON, COMMONWEALTH OF MASSACHUSETTS,

SERVE: ASSISTANT DISTRICT ATTORNEY THEODORE GLYNN, JR. AGENT OF THE SUFFOLK COUNTY DISTRICT ATTORNEY, 21 EARLE ROAD, WELLESLEY, MASSACHUSETTS,

DEFENDANT.

COMPLAINT

(Permanent Injunction and Preliminary Injunction)

Plaintiffs, by their attorneys, allege as follows:

(1) Jurisdiction of this action is conferred upon this Court by Title 28 U.S.C. Sec. 1343, on the theory that this is a civil rights action under Title 42 U.S.C. Sec. 1983. The amount in controversy exceeds Ten Thousand ($10,000.00) Dollars exclusive of interest and costs.

(2) Film Distributors, Inc. is a Massachusetts corporation doing business under the trade name of Symphony Cinema I, a theatre located at 252 Huntington Avenue, in Boston. James Vlamos is a resident of the City of Boston and the President of both corporations. Symphony Cinema II, Inc. is a Massachusetts corporation doing business under the trade name of Symphony Cinema, II, a theatre located at 252 Huntington Avenue, in Boston. Serafim Karalexis is the theatre manager of both theatres, and an employee of both corporations.

(3) The defendant is the duly elected district attorney for Suffolk County in the Commonwealth of Massachusetts.

(4) On Wednesday morning, May 28, 1969, the plaintiffs commenced the exhibition of the motion picture known as "I Am Curious (Yellow)" at the theatres Symphony Cinema I and Symphony Cinema II in the City of Boston.

(5) On Thursday, May 29, 1969, the defendant did order his agents and servants in the Boston Police Department to make application for a search warrant for authority to seize the print of the motion picture "I Am Curious (Yellow)" playing at the aforementioned theatres. Such warrant was granted by the First Assistant Clerk of the Roxbury District Court of the City of Boston on Thursday, May 29, 1969, and on that afternoon, officers of the Boston Police Department did seize the print of the motion picture in the custody of the plaintiffs.

(6) A copy of the search warrant secured by Sergeant Edmund Griffin of the Boston Police Department, under color of authority granted in Sections 1, 2, 2A, 2B and 2C of Chapter 276 of the Massachusetts General Laws is attached hereto as Exhibit A. The warrant was in three parts — the warrant, the affidavit, and the report of Detective Garrett Flanagan as attached to the affidavit. This document in all three parts is attached as aforesaid.

(7) At no time prior to the seizure of the film was there any prior adversary proceeding to determine the alleged obscenity of the motion picture "I Am Curious (Yellow)."

(8) That on Tuesday morning, June 3, 1969, indictments were returned against all of the plaintiffs herein by the Suffolk County Grand Jury for alleged violation of Section 28A and Section 32 of Chapter 272 of the Massachusetts General Laws — to wit, possessing an obscene

motion picture and exhibiting an obscene motion picture, namely, the film "I Am Curious (Yellow)."

(9) Proceedings preliminary to trial in the Suffolk Superior Court commenced on the morning of Tuesday, June 11, 1969, in front of Superior Court Chief Justice Joseph Tauro. As of the date of this complaint, preliminary matters are still being heard before the said Judge Tauro.

(10) That on May 28, 1969, the Supreme Judicial Court of Massachusetts in the case of *Commonwealth* v. *State Amusement Corporation*, did declare that seizure of a motion picture could take place within the Commonwealth of Massachusetts by a police officer, after the police officer had made a report to a judge of a local district court. The Massachusetts Supreme Judicial Court held that this was "a procedure designed to focus searchingly on the question of obscenity." By implication, since there was no adversary proceeding prior to the seizure of the motion picture in the *State Amusement Corporation* case, the Supreme Judicial Court of Massachusetts has declared that a prior adversary proceeding before seizure of a motion picture is not necessary within the Commonwealth of Massachusetts. Case is attached hereto as Exhibit B.

(11) That for the case in which the plaintiffs are defendants in the Suffolk Superior Court, the said Judge Tauro is therefore bound by the decision of the Massachusetts Supreme Judicial Court that a prior adversary proceeding before seizure of a motion picture which is alleged to be obscene is not necessary.

(12) That the seizure of the motion picture "I Am Curious (Yellow)" by the defendant, his agents or servants, without a prior adversary proceeding as to its alleged obscenity, is a violation of the rights of the plaintiffs herein under the First, Fourth, and Fourteenth Amendments of the United States Constitution, and is of such a nature that

unless a permanent injunction is granted by this Court to enjoin the actions of the defendant so as to direct the defendant to return to the plaintiffs the print of the motion picture "I Am Curious (Yellow)" which was seized by the defendant, his agents or servants, and enjoining the defendant from any further seizure of any of the prints of the motion picture "I Am Curious (Yellow)," until such time as a prior adversary proceeding as to its alleged obscenity has been held in some appropriate court in the Commonwealth of Massachusetts, that your plaintiffs herein have and will continue to suffer irreparable harm and damage.

(13) That the plainitffs herein have been able to continue to exhibit the motion picture "I Am Curious (Yellow)" since May 30, 1969, because of the consideration and courtesy of the defendant in asserting that he would make no further seizures and prosecutions for the exhibition of this film, as a violation of Sections 28A and 32 as aforesaid. There is no judicial or statutory restraint upon the defendant from any further seizure and prosecution for exhibition of this film, should the defendant change his mind.

(14) That in *Commonwealth* v. *State Amusement Corporation*, the Massachusetts Supreme Judicial Court was asked to consider whether or not Section 32 is sufficiently definite given the constitutional standards for an obscenity prosecution as set forth by the United States Supreme Court in *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1966), and *Redrup* v. *New York*, 386 U.S. 767 (1967). The Massachusetts Supreme Judicial Court did not answer this question. Nor has the Massachusetts Supreme Judicial Court ever supplied the standard of "knowing the work to be obscene" to Section 32.

WHEREFORE, plaintiffs pray:

(1) That a preliminary injunction and a permanent in-

junction be granted prohibiting the defendant, his agents or servants, from any further seizures of prints of the motion picture "I Am Curious (Yellow)" without a prior adversary proceeding in an appropriate court in Massachusetts as to the alleged obscenity of the motion picture.

(2) That the Court order the defendant to return to the plaintiffs herein the print of the motion picture "I Am Curious (Yellow)" seized by the defendant, his agents or servants, on Thursday, May 29, 1969; that the Court order the suppression of its evidence in the cases now pending against the plaintiffs herein in Suffolk Superior Court as aforesaid; both for the reason that there was no prior adversary proceeding before seizure of the print, which was then exhibited to the Grand Jury and the basis upon which indictments were returned.

(3) That this Court order a preliminary injunction, and following appropriate hearing, a permanent injunction, against the defendant, his agents or servants, from any further continuation of the prosecution of the plaintiffs herein as they are defendants in the case in Suffolk Superior Court, on the grounds of alleged violation of Section 32 of Chapter 272 of the Massachusetts General Laws until such time as the said Section 32 has been altered and amended to include the following:

(a) Requirement of "knowledge" on the part of the exhibitor of a particular work.

(b) Definition of Section 32 to the effect that no conduct is proscribed therein beyond what has now become the constitutional definition of the crime of obscenity.

(c) That provisions for an expedited trial on the merits of the question of obscenity, and expedited appeal if the trial court finds obscenity, a fixed time within which the trial must be held, a fixed time

within which a trial court must render its judgment in the event that the case is jury waived, a fixed time within which an Appellate Court must hear an appeal, and a fixed time within which the Appellate Court must render its judgment.

(d) Lacking the opportunity to implement this, the State must provide for provisions by which the work of art can continue to be exhibited, with the exhibitors free from further prosecution during such interim period.

(e) That no prosecution under this section can be commenced on the basis of First Amendment evidence which is seized without a prior adversary proceeding.

(4) That this Court order a preliminary injunction, and following appropriate hearing, a permanent injunction, against the defendant, his agents or servants, from any further continuation of the prosecution of the plaintiffs herein as they are defendants in the case in Suffolk Superior Court, on the grounds of alleged violation of Section 28A of Chapter 272 of the Massachusetts General Laws until such time as the said Section 28A has been altered and amended to include the following:

(a) That provisions for an expedited trial on the merits of the question of obscenity, an expedited appeal if the trial court finds obscenity, a fixed time within which the trial must be held, a fixed time within which a trial court must render its judgment in the event that the case is jury waiver, a fixed time within which an Appellate Court must hear an appeal, and a fixed time within which the Appellate Court must render its judgment.

(b) Lacking the opportunity to implement this, the State must provide for provisions by which the work of art can continue to be exhibited, with the exhibi-

tors free from further prosecution during such interim period.

(c) That no prosecution under this section may be commenced on the basis of First Amendment evidence which is seized without a prior adversary proceeding.

(5) Your plaintiffs further pray that an injunction issue restraining this prosecution of the motion picture "I Am Curious (Yellow)," or any further prosecution in this jurisdiction of the motion picture "I Am Curious (Yellow)" on the grounds that it is "allegedly obscene." Plaintiffs contend and pray herein on the basis that any such prosecution is "without hope of success." As reasons for this plaintiffs offer:

(a) The decision of the United States Court of Appeals for the Second Circuit that this film is not obscene. *United States* v. *A Motion Picture Film Entitled "I Am Curious (Yellow)*," 285 F. Supp. 465 (1968).

(b) That for the trial of such case, it was admitted by the United States Department of Customs that the film does have "social value."

(c) That the film is now playing without prosecution in approximately 10 major, metropolitan centers throughout the country. See affidavit.

(d) That this film has received serious and praiseworthy review by newspapers, magazines, television stations and radio stations throughout the country. That it has been treated as a serious work of art in all of the communication outlets as aforesaid.

(e) That as per the affidavit attached to this complaint, more than 25 leading citizens of the Greater Boston community have personally expressed their willingness to the attorney for the plaintiffs herein to testify at any trial concerning the alleged obscenity of the motion picture, to the effect that the motion

picture is not obscene and does indeed have "social value." Affidavit is attached hereto.

(6) For such other and further relief as this Court shall deem essential or proper in accordance with equity and law.

PLAINTIFFS, Serafim Karalexis,
James Vlamos,
Symphony Cinema II, Inc.,
and Film Distributors, Inc.
By their Attorney,
HERBERT S. SWARTZ

[*Certificate of Service — Omitted*]

[Exhibits Omitted]

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[TITLE OMITTED]

MOTION TO AMEND COMPLAINT

Plaintiffs move the Court for leave to amend their complaint by striking same except for the exhibits attached thereto and substituting therefor the complaint hereto attached and entitled AMENDED COMPLAINT.

Attorney for Plaintiffs,

HERBERT S. SWARTZ
1330 Beacon Street
Brookline, Massachusetts

[Certificate of Service — Omitted]

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[1] The indictments in Suffolk Superior Court against the plaintiffs are as follows: 42587 and 42588 against the two corporations; 42589 and 42590 against Vlamos as he is the President of both corporations; 42591 and 42592 against Karalexis. All six indictments are in violation of Sections 28A and 32, Chapter 272 of the Massachusetts General Laws.

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

[TITLE OMITTED]

AMENDED COMPLAINT

(Permanent and Preliminary Injunction)

Plaintiffs, by their attorneys, alleged as follows:

(1) Jurisdiction of this action is conferred upon this Court by Title 28 U.S.C., Sec. 1343, on the theory that this is a civil rights action under Title 42 U.S.C., Sec. 1983. The amount in controversy exceeds Ten Thousand ($10,000.00) Dollars exclusive of interest and costs.

(2) Film Distributors, Inc. is a Massachusetts corporation doing business under the trade name of Symphony Cinema I, a theatre located at 252 Huntington Avenue, in Boston. James Vlamos is a resident of the City of Boston and the President of both corporations. Symphony Cinema II, Inc. is a Massachusetts corporation doing business under the trade name of Symphony Cinema II, a theatre located at 252 Huntington Avenue, in Boston. Serafim Karalexis is the theatre manager of both theatres, and an employee of both corporations.

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(5) On Thursday, May 29, 1969, the defendant did order his agents and servants in the Boston Police Department to make application for a search warrant for authority to seize the print of the motion picture "I Am Curious (Yellow)" playing at the aforementioned theatres. Such warrant was granted by the First Assistant Clerk of the Roxbury District Court of the City of Boston on Thurs-

day, May 29, 1969, and on that afternoon, officers of the Boston Police Department did seize the print of the motion picture in the custody of the plaintiffs.

(6) A copy of the search warrant secured by Sergeant Edmund Griffin of the Boston Police Department, under color of authority granted in Sections 1, 2, 2A, 2B and 2C of Chapter 276 of the Massachusetts General Laws is attached hereto as Exhibit A. The warrant was in three parts — the warrant, the affidavit, and the report of Detective Garrett Flanagan as attached to the affidavit. This document in all three parts is attached as aforesaid.

(7) At no time prior to the seizure of the film was there any prior adversary proceeding to determine the alleged obscenity of the motion picture "I Am Curious (Yellow)."

(8) That on Tuesday morning, June 3, 1969, indictments were returned against all of the plaintiffs herein by the Suffolk County Grand Jury for alleged violation of Section 28A and Section 32 of Chapter 272 of the Massachusetts General Laws — to wit, possessing an obscene motion picture and exhibiting an obscene motion picture, namely, the film "I Am Curious (Yellow)."

(9) Proceedings preliminary to trial in the Suffolk Superior Court commenced on the morning of Tuesday, June 11, 1969, in front of Superior Court Chief Justice Joseph Tauro. As of the date of this complaint, preliminary matters are still being heard before the said Judge Tauro.

(10) That on May 28, 1969, the Supreme Judicial Court of Massachusetts in the case of *Commonwealth* v. *State Amusement Corporation*, did declare that seizure of a motion picture could take place within the Commonwealth of Massachusetts by a police officer, after the police officer had made a report to a judge of a local district court. The Massachusetts Supreme Judicial Court held that this was "a procedure designed to focus searchingly on the question of obscenity." By implication, since there was no adver-

sary proceeding prior to the seizure of the motion picture in the *State Amusement Corporation* case, the Supreme Judicial Court of Massachusetts has declared that a prior adversary proceeding before seizure of a motion picture is not necessary within the Commonwealth of Massachusetts. Case is attached hereto as Exhibit B.

(11) That for the case in which the plaintiffs are defendants in the Suffolk Superior Court, the said Judge Tauro is therefore bound by the decision of the Massachusetts Supreme Judicial Court that a prior adversary proceeding before seizure of a motion picture which is alleged to be obscene is not necessary.

(12) That the seizure of the motion picture "I Am Curious (Yellow)" by the defendant, his agents or servants, without a prior adversary proceeding as to its alleged obscenity, is a violation of the rights of the plaintiffs herein under the First, Fourth, and Fourteenth Amendments of the United States Constitution, and is of such a nature that unless a permanent injunction is granted by this Court to enjoin the actions of the defendant so as to direct the defendant to return to the plaintiffs the print of the motion picture "I Am Curious (Yellow)" which was seized by the defendant, his agents or servants, and enjoining the defendant from any further seizure of any of the prints of the motion picture "I Am Curious (Yellow)," until such time as a prior adversary proceeding as to its alleged obscenity has been held in some appropriate court in the Commonwealth of Massachusetts, that your plaintiffs herein have and will continue to suffer irreparable harm and damage.

(13) That the plaintiffs herein have been able to continue to exhibit the motion picture "I Am Curious (Yellow)" since May 30, 1969, because of the consideration and courtesy of the defendant in asserting that he would make no further seizures and prosecutions for the exhibition of

this film, as a violation of Sections 28A and 32 as aforesaid. There is no judicial or statutory restraint upon the defendant from any further seizure and prosecution for exhibition of this film, should the defendant change his mind.

(14) That in *Commonwealth v. State Amusement Corporation*, the Massachusetts Supreme Judicial Court was asked to consider whether or not Section 32 is sufficiently definite given the constitutional standards for an obscenity prosecution as set forth by the United States Supreme Court in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), and *Redrup v. New York*, 386 U.S. 767 (1967). The Massachusetts Supreme Judicial Court did not answer this question. Nor has the Massachusetts Supreme Judicial Court ever supplied the standard of "knowing the work to be obscene" to Section 32.

(15) Section 32 of Massachusetts General Laws, Chapter 272

(a) Contains no requirement that an alleged violator "know the work to be obscene."

(b) Section 32 proscribes conduct which is beyond the constitutional definition of the crime of obscenity.

(c) There are no provisions in Section 32 for an expedited trial on the merits of the question of obscenity, and expedited appeal if the trial court finds obscenity, a fixed time within which a trial must be held, a fixed time within which a trial court must render its judgment in the event that the case is jury waived, a fixed time within which an Appellate Court must hear an appeal, nor a fixed time within which the Appellate Court must render its judgment.

(d) There is no provision in Section 32 that if any prosecution is commenced under this section on the basis of First Amendment evidence, such evidence cannot be seized without a prior adversary proceeding.

(e) There is no provision in Section 32 by which the

work of art can continue to be exhibited, with the exhibitor free from further prosecution during such interim period, until such time as there is a final adjudication of the alleged obscenity.

Said Section 32 of Massachusetts General Laws, Chapter 272 is unconstitutional.

(16) Section 28A of Massachusetts General Laws, Chapter 272

(a) There are no provisions in Section 28A for an expedited trial on the merits of the question of obscenity, and expedited appeal if the trial court finds obscenity, a fixed time within which a trial must be held, a fixed time within which a trial court must render its judgment in the event that the case is jury waived, a fixed time within which an Appellate Court must hear an appeal, nor a fixed time within which the Appellate Court must render its judgment.

(b) There is no provision in Section 28A that if any prosecution is commenced under this Section on the basis of First Amendment evidence, such evidence cannot be seized without a prior adversary proceeding.

(c) There is not provision in Section 28A by which the work of art can continue to be exhibited, with the exhibitor free from further prosecution during such interim period, until such time as there is a final adjudication of the alleged obscenity.

Said Section 28A of Massachusetts General Laws, Chapter 272 is unconstitutional.

WHEREFORE, plaintiffs pray:

(1) That a preliminary injunction and a permanent injunction be granted prohibiting the defendant, his agents or servants, from any further seizures of prints of the motion picture "I Am Curious (Yellow)" without a prior adversary proceeding in an appropriate court in Massachusetts as to the alleged obscenity of the motion picture.

(2) That the Court order the defendant to return to the plaintiffs herein the print of the motion picture "I Am Curious (Yellow)" seized by the defendant, his agents or servants, on Thursday, May 29, 1969; that the Court order the suppression of its evidence in the cases now pending against the plaintiffs herein in Suffolk Superior Court as aforesaid; both for the reason that there was no prior adversary proceeding before seizure of the print, which was then exhibited to the Grand Jury and the basis upon which indictments were returned.

(3) That this Court order a preliminary injunction, and that following appropriate hearing, a permanent injunction, against the defendant, his agents or servants, from any further continuation of the prosecution of the plaintiffs herein in the said six actions now pending in the Suffolk Superior Court (Docket numbers 42587, through 42592) until such time as the said Sections 32 and 28A of Massachusetts General Laws, Chapter 272, have been appropiately altered and amended.

(4) Your plaintiffs further pray that an injunction issue restraining this prosecution of the motion picture "I Am Curious (Yellow)," or any further prosecution in this jurisdiction of the motion picture "I Am Curious (Yellow)" on the grounds that it is "allegedly obscene." Plaintiffs contend any pray herein on the basis that any such prosecution is "without hope of success." As reasons for this plaintiffs offer:

(a) The decision of the United States Court of Appeals for the Second Circuit that this film is not obscene. *United States* v. *A Motion Picture Film Entitled "I Am Curious (Yellow)."* 285 F. Supp. 465 (1968).

(b) That for the trial of such case, it was admitted by the United States Department of Customs that the film does have "social value."

(c) That the film is now playing without prosecu-

tion in approximately 10 major, metropolitan centers throughout the country. See affidavit.

(d) That this film has received serious and praiseworthy reviews by newspapers, magazines, television stations and radio stations throughout the country. That it has been treated as a serious work of art in all communications outlets as aforesaid.

(e) That as per the affidavit attached to this complaint, more than 25 leading citizens of the Greater Boston community have personally expressed their willingness to the attorney for the plaintiffs herein to testify at any trial concerning the alleged obscenity of the motion picture, to the effect that the motion picture is not obscene and does indeed have "social value." Affidavit is attached hereto.

(5) For such other and further relief as this Court shall deem essential or proper in accordance with equity and law.

PLAINTIFFS, SERAFIM KARALEXIS, JAMES VLAMOS, SYMPHONY CINEMA II, INC., AND FILM DISTRIBUTORS, INC.

By their Attorney,

(s) HERBERT S. SWARTZ

HERBERT S. SWARTZ

---

1 The indictments in Suffolk Superior Court against the plaintiffs are as follows: 42587, and 42588 against the two corporations, 42589 and 42590 against Vlamos as he is the President of both corporations; 42591 and 42592 against Karalexis. All six indictments are in violation of Sections 28A and 32, Chapter 272 of the Massachusetts General Laws.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[TITLE OMITTED]

Before ALDRICH, *Circuit Judge*, and JULIAN and PETTINE, *District Judges*

TEMPORARY INJUNCTION
June 24, 1969

After due notice and hearing, and pursuant to this Court's ruling filed this day on the plaintiffs' application for a temporary injunction, it is hereby ordered that pending further order of this Court the defendant, Garrett Byrne, as he is the District Attorney for the County of Suffolk, Commonwealth of Massachusetts, be and he is hereby restrained from prosecuting the indictments pending against the plaintiffs herein in the Superior Court in and for said County, being criminal cases numbered 42587 through 42592, other than for the purpose of considering and deciding pending or new motions to dismiss, and pending or new motions to suppress evidence.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[TITLE OMITTED]

Before ALDRICH, *Circuit Judge*, and JULIAN and PETTINE, *District Judges*

RULING ON PLAINTIFFS' APPLICATION
FOR A PRELIMINARY INJUNCTION
June 24, 1969

In this three-judge court case plaintiffs seek a declaration that Mass. Gen. Laws c. 272, §§ 28A and 32, are un-

constitutional. Although the allegations are not that simple, plaintiffs may be said to allege two basic grounds. The first is that their moving picture, "I Am Curious (Yellow)," was seized without an adversary preliminary hearing in alleged violation of their First Amendment rights. Neither statute makes any provision covering this matter. The seizure was affected as a result of a search warrant issued on the basis of an affidavit. We do not recognize, nor are we asked to recognize, *in limine* jurisdiction to vacate improperly issued search warrants, if this one be assumed to be such. The statutes are not unconstitutional merely because the prosecution conducted, if it did, an improper search for evidence.

Secondly, sections 28A and 32 may appear to be unconstitutional on their face in that they make criminal the publication of obscene matter in the absence of knowledge of the content of the publication. *Cf. Smith* v. *California*, 1959, 361 U.S. 147. The Massachusetts court has construed section 28A, however, implicitly to require proof of scienter. *Demetropolis* v. *Commonwealth*, 1961, 342 Mass. 658. The court has not passed upon section 32 in this respect.

It was stated in open court that the indictments pending against plaintiffs in the state Superior Court do not contain an allegation of defendants' knowledge of the content of the picture. If the statute impliedly contains such a requirement we would suppose that it should be alleged, for in the absence of such allegation the grand jury might have indicted without finding probable cause as to that element of the offense.

A federal court should be slow to declare a state statute unconstitutional when there be doubt as to an unconstitutional meaning. Particularly should this be true when the state court has, through a past ruling, indicated that it might give the statute an interpretation which made it constitutional. Whatever may be the limits of 28 U.S.C. § 2283, plaintiffs have here full opportunity to obtain a ruling

from the state court. By motions to dismiss the indictments on the ground of failure to allege scienter, the filing of which we will assume the state court would permit, plaintiffs may seek a construction of the statute. If the court construes the statute in plaintiffs' favor, presumably it will dismiss the indictments. If it construes it as not requiring scienter and denies the motions to dismiss, then we will be free to hold the statute unconstitutional for lack of an essential element, should we so determine, and grant the relief sought herein.

Under the circumstances we shall issue a temporary injunction restraining the prosecution of the state court proceedings pending further order of this court other than for the purpose of considering and deciding pending or new motions to dismiss, and pending or new motions to suppress evidence.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

[TITLE OMITTED]

MOTION TO FILE AN AMENDMENT TO AMENDED COMPLAINT; AND TO FILE A SUPPLEMENTARY BRIEF

Plaintiffs move the Court for leave to file an amendment to their amended complaint, said amendment attached hereto and titled AMENDMENT TO AMEND COMPLAINT; and for leave to file a supplementary brief, which is attached hereto.

Attorney for Plaintiffs,
HERBERT S. SWARTZ
1330 Beacon Street
Brookline, Massachusetts

[Certificate of Service Omitted]

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

[TITLE OMITTED]

AMENDMENT TO AMENDED COMPLAINT

Now come the plaintiffs in the above matter and hereby move that Prayer (5) on Page 8 of their Amended Complaint be deleted and a new Prayer (5) be inserted in its place as follows:

(5) That this Court declare and say that Sections 28A and 32 of Chapter 272 of the Massachusetts General Laws are unconstitutional on their face, and unconstitutional in their application to the plaintiffs herein, all in accordance with Title 28, U.S.C. Section 2201.

That a new Prayer (6), (the previous Prayer (5)), be added to the Amended Complaint as follows:

(6) For such other and further relief as this Court shall deem essential or proper in accordance with equity and law.

PLAINTIFFS, SERAFIM KARALEXIS, JAMES VLAMOS, SYMPHONY CINEMA II, INC., AND FILM DISTRIBUTORS, INC.
By their Attorney,
HERBERT S. SWARTZ

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

[TITLE OMITTED]

MOTION TO FILE AN AMENDMENT TO AMENDED COMPLAINT — II (FOLLOWING DISMISSAL OF ORIGINAL INDICTMENTS IN SUFFOLK SUPERIOR COURT)

Plaintiffs move the Court for leave to file a further amendment to their amended complaint, said amendment attached hereto and titled AMENDMENT TO AMENDED COMPLAINT — II (Following Dismissal of Original Indictments In Suffolk Superior Court).

Attorney for Plaintiffs,
HERBERT S. SWARTZ
1330 Beacon Street
Brookline, Massachusetts

[Certificate of Service Omitted]

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

[TITLE OMITTED]

AMENDMENT TO AMENDED COMPLAINT — II (Following Dismissal of Original Indictments in Suffolk Superior Court)

Now come the plaintiffs in the above matter and hereby move that the following allegations be added to Page 6 of their Amended Complaint, as follows:

(17) Following hearing of this case before a three-

judge court, the said three-judge court on Tuesday, June 24, 1969, did issue a temporary restraining order against the pending state indictments as aforesaid.

(13) The attorney for the plaintiffs herein, the defendants in Suffolk Superior Court, did make a motion in Suffolk Superior Court before Judge Tauro on Wednesday morning, June 25, 1969, to have the pending indictments dismissed. This motion was assented to by the Commonwealth and said indictments have now been dismissed, being all of the indictments set forth as aforesaid in this Complaint.

(19) That request has now been made to the attorney for the plaintiffs herein by the Office of the Suffolk County District Attorney that the said attorney make available to the Office of the Suffolk County District Attorney one print of the motion picture "I Am Curious (Yellow)." This print will be used for any further investigations to be made by the Office of the Suffolk County District Attorney, and for further use if necessary if presentation is made to the Grand Jury sitting for and of the County of Suffolk for the return of indictments against your plaintiffs herein, similar to the original indictments for which this Complaint was brought. The attorney for the plaintiffs herein has made available to the Office of the Suffolk County District Attorney one print of the motion picture "I Am Curious (Yellow)," and in furtherance of the request made by the Office of the Suffolk County District Attorney this print may be used for whatever purposes are necessary at trial of the plaintiffs herein, if indictments are returned against them in Suffolk County by the Grand Jury.

(20) On information and belief, the plaintiffs herein say that they do anticipate that further indictments will be sought against them by the Office of the Suffolk County District Attorney for alleged violations of Section 28A of Chapter 272 of the Massachusetts General Laws. That pro-

secution for an offense under Section 28A would require that the defendants "know the work to be obscene." *Demetropolos* v. *Commonwealth*, 342 Mass. 658 (1961).

(21) That in reliance upon *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1966), the Massachusetts Supreme Judicial Court still follows the criteria set up in that case for the constitutional definition of obscenity — (1) That the dominant theme of the work appeals to a prurient interest in sex; (2) That the work is patently offensive to contemporary community standards of sexual representation or description; and (3) That the work is utterly without social value. See *Commonwealth* v. *State Amusement Corporation*, Paragraph 10 of the Amended Complaint, *supra*.

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II

The plaintiffs in the above matter further and hereby move this Honorable Court to amend their Complaints by deleting Prayers (5) and (6), originally on Page 8 of their Amended Complaint, as added to it by the Amendment to the Amended Complaint, and that following deletion of said Prayers (5) and (6), the following prayers be added in their place as follows:

(5) That this Court declare and say that Section 28A of Chapter 272 of the Massachusetts General Laws is unconstitutional of its face, and unconstitutional in its application to the plaintiffs herein, all in accordance with Title 28 U.S.C., Section 2201.

(6) That this Court declare and say that the motion picture "I Am Curious (Yellow)" is not obscene within the constitutional definition of obscenity as set forth by the United States Supreme Court in *Redrup* v. *New York*, 386 U.S. 767 (1967). See also *Books, Inc.* v. *United States*, 385 F. 2d 935 (1 Cir. 1966), rev'd 388 U.S. 449 (1967).

(7) That this Court restrain any future prosecutions of the motion picture "I Am Curious (Yellow)" on the grounds that it is "allegedly obscene" within the terms of

Section 28A of Chapter 272, for the reason that there is no way that any future defendant in such prosecution could "know the work to be obscene."

(8) That any further prosecutions of the motion picture "I Am Curious (Yellow)" on the grounds that it is "allegedly obscene" and therefore violative of Section 28A of Chapter 272 of Massachusetts' General Laws be restrained until such time as the Massachusetts courts affirm that the standards for finding a work obscene within the constitutional definition of obscenity as set forth in *Redrup* v. *New York, supra,* are that — (1) That the work was being shown to those under the age of 18; (2) Or that the work was an invasion of privacy; or (3) That the work was being advertised in a "pandering" manner.

(9) That this Court issue an injunction restraining any further prosecutions of the plaintiffs herein for the showing of the motion picture "I Am Curious (Yellow)" on the grounds that any prosecution is "without hope of success," in that given the decision of the Second Circuit, no prosecution could hope to prove that this film is "utterly without social value" or that if is "patently offensive to contemporary community standards of sexual representation or description," interpreting the word "community" as implying a *national* standard. See *Jacobellis* v. *Ohio,* 378 U.S. 184 (1964); *Manual Enterprises* v. *Day,* 379 U.S. 478 (1962); and *In re Gianini,* 72 Cal. Rptr. 655 (1968).

(10) For such other and further relief as this Court shall deem essential or proper in accordance with Equity and Law.

PLAINTIFFS, SERAFIM KARALEXIS, JAMES VLAMOS, SYMPHONY CINEMA II, INC., AND FILM DISTRIBUTORS, INC.
By their Attorney,
HERBERT S. SWARTZ

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[TITLE OMITTED]

Before ALDRICH, *Circuit Judge*, and JULIAN and PETTINE, *District Judges*

MEMORANDUM AND RULINGS ON MOTION TO FURTHER AMEND COMPLAINT, ON MOTION TO INTERVENE, AND ON MOTION FOR PRELIMINARY INJUNCTION

July 15, 1969

The motion to further amend the complaint is allowed.

The motion for leave to intervene is denied. (Proposed intervenor may file an amicus brief at such times as briefs may be appropriate.)

The motion for a temporary injunction is denied at this time, subject to renewal if and when petitioner is convicted in the Superior Court. If petitioner is convicted and the prosecution offers to renew the present stipulation, that no seizure of film or interruption with the showing be made, the motion for injunction shall not be renewed until a motion for judgment n.o.v. shall be heard and determined against the petitioner, or for 30 days after verdict, whichever shall first occur.

Although the court has allowed the motion to further amend, it will not consider now or at any time the claim that petitioner's film is not obscene, as an evidentiary matter. The court may consider ruling on the question whether the statute is unconstitutional on its face, or whether it is unconstitutional to prosecute an obscene publication not conspicuously or pruriently advertised and not available to minors.

The court presently invites briefs on the following questions:

has been given, 28 U.S.C. § 2284, and an assistant attorney general has conducted the defense throughout. Plaintiffs seek a declaration that the statute is unconstitutional and an injunction against prosecution thereunder. Because of the fact that the original indictments were defective, the proceedings sought to be enjoined postdate the assumption of jurisdiction by this court, and no question arises under 28 U.S.C. § 2283, the anti-injunction, or what is sometimes called the comity, statute.

Defendant's broad motion to dismiss tests the substance of plaintiffs' case. Our present question, however, is only whether we shall issue a temporary injunction pending final disposition, there being possible reasons to withhold the making of a final decision, which we have not yet fully explored. Alternatively, there is the question whether we should abstain altogether, without granting temporary relief. With respect to the first question, the issues, of couse, are whether there is a probability that plaintiffs will ultimately prevail, *Automatic Radio Mfg. Co.* v. *Ford Motor Co.*, 1 Cir., 1968, 390 F.2d 113, *cert. denied* 391 U.S. 914, and the adequacy of the remedy at law.

The following facts appear by stipulation of counsel or otherwise. Plaintiffs have sufficiently indicated to the viewing public the possible offensiveness of the film, so that no patron will be taken unawares and his sensibilities offended. On the other hand, the film is not advertised in any pandering manner within the stricture of *Ginsburg* v. *United States*, 1966, 383 U.S. 463. Finally, it is conceded that the theatre is policed, so that no minors are permitted to enter.

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which is obscene, indecent or impure, or an obscene, indecent or impure print, picture, figure, image or description, or buys, procures, receives or has in his possession any such pamphlet, ballard, printed paper, phonographic record, obscene, indecent or impure print, picture, figure, image or other thing, for the purpose of sale, exhibition, loan or circulation, shall be punished . . . ."

For purposes of this case we assume that the film is obscene by standards currently applied by the Massachusetts courts.[3] In this connection we note that the Superior Court of Massachusetts, in the recent case of *Commonwealth* v. *Karalexis*, has found that "the dominant theme of the film ... is its appeal to prurient interest in sex .... [The film] is patently offensive to the average person and an affront to community standards ... [It] is utterly without redeeming social value." Except insofar as it found statements in the opinion favorable to its conclusions in other respects, the Superior Court disposed of *Stanley* v. *Georgia* by stating it to be "irrelevant."

In *Stanley* Mr. Justice Marshall wrote the opinion of the Court in which four others joined. Mr. Justice Black concurred in the result because, in his mind, no case-by-case reasoning is needed in the area of obscenity; all is permissible.[4] The remaining three justices concurred on Fourth Amendments grounds,[5] stating that the obscenity question should not have been reached. The Court held that

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[3] Another court, viewing this same film, has differed. *United States* v. *"I Am Curious (Yellow),"* 2 Cir., 1968, 404 F.2d 196.

[4] The Superior Court's extensive analysis in *Karalexis* of a decade of the Supreme Court's views, reaching the conclusion that there is no majority agreement on any one approach to obscenity apart from the fact that it disregards such an agreement in *Stanley*, overlooks the fact that if only four, or even three justices agree on one method by which immunity is reached, this agreement is as significant as if five joined, so long as there are enough other justices who can be counted on to concur in the result. If we may be pardoned the analogy, if deuces are wild, an inside straight flush and a deuce takes the pot.

[5] Not the Fourth Amendment grounds on which the defendants assert the majority opinion rests. The three concurring justices regarded the warrant under which Stanley's home had been searched insufficient to justify the seizure of the film. The opinion of the Court, pointedly, it may be thought, ignored that issue. The present defendant's claim that, nevertheless; the Court looked to a Fourth Amendment general protection of privacy, is made in the face of the fact that the Court spoke constantly in terms of the First and Fourteenth Amendments and did not mention the Fourth.

If an adult individual may view obscene material in the privacy of his home,

a) can he purchase obscene material for such purpose?
b) can he invite friends to the viewing?
c) can he go to a private place to view such material?
d) can a group of persons go to such private place?
e) can they go to an adequately controlled public place?

(s) BAILEY ALDRICH
BAILEY ALDRICH
(s) ANTHONY JULIAN
ANTHONY JULIAN
(s) RAYMOND J. PETTINE
RAYMOND J. PETTINE
B.A.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

[TITLE OMITTED]

MOTION FOR ABSTENTION

Now comes the defendant in the above entitled action and, by his attorney, moves this Honorable Court to abstain from granting the relief sought in the Complaint filed herein, or otherwise passing upon the issues raised in the Complaint, pending resolution of those issues by the courts of the Commonwealth of Massachusetts.

Respectfully submitted,
ROBERT H. QUINN,
Attorney General.
LAWRENCE P. COHEN,
Deputy Assistant
Attorney General.

[Certificate of Service Omitted]

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

[TITLE OMITTED]

Before ALDRICH, *Circuit Judge*,
JULIAN and PETTINE, *District Judges*.

OPINION

November 28, 1969

ALDRICH, *Circuit Judge*. This is a three-judge district court action in which a frontal attack is made upon a state obscenity statute, based upon the Court's recent decision in *Stanley* v. *Georgia*, 1969, 394 U.S. 557. In that case the Court reversed a state conviction for possession of a concededly obscene moving picture film, found in the home of the defendant. We are asked to rule that this decision extends to a case where the possessors permitted a number of consenting adults or, more exactly, paying adult members of the public, to view their possibly obscene picture in a moving picture house.

Briefly, the facts are these. Plaintiffs Karalexis et al. are the owners and operators of a moving picture theatre which has been engaged in showing a film, owned and leased by Grove Press, Inc.,[1] entitled "I Am Curious (Yellow)." The named defendant is the county district attorney who has charged plaintiffs with violation of Mass. G.L. c. 272 § 28A[2] as a result of their exhibiting the film, but notice

[1] Grove Press, Inc.'s motion to intervene was originally denied, counsel being permitted, instead, to appear as an amicus. In view of this opinion, Grove Press may be allowed to renew its motion at an early date.

[2] "§ 28A. Importing, printing, distributing or possessing obscene things

Whoever imports, prints, publishes, sells or distributes a pamphlet, ballard, printed paper, phonographic record, or other thing

in certain circumstances possession of a moving picture film is constitutionally protected even though by contemporary standards the film is obscene. We do not consider this irrelevant.

The question is, how far does *Stanley* go. Is the decision to be limited to the precise problem of "mere private possession of obscene material," 394 U.S. at 561; is it the high water mark of a past flood, or is it the precoursor of a new one? Defendant points to the fact that the Court in *Stanley* stated that *Roth* v. *United States*, 1957, 354 U.S. 476, was "not impaired by today's holding," and in the course of its opinion recognized the state's interest there upheld in prohibiting public distribution of obscenity. Yet, with due respect, *Roth* cannot remain intact, for the Court there had announced that "obscenity is not within the area of constitutionally protected speech or press," 354 U.S. at 485,[6] whereas it held that Stanley's interest was protected by the First Amendment, and that the fact that the film was "devoid of any ideological content" was irrelevant. 394 U.S. at 566.

Of greater importance, a need for affirmative proof that obscenity raises a "clear and present danger of antisocial conduct or will probably induce its recipients to such conduct," rejected in *Roth*, was stated in *Stanley* to have been rejected in the area of "public distribution." The obverse is apparent. Of necessity the *Stanley* court held that obscenity presented no clear and present danger to the adult viewer, or to the public as a result of his exposure. Obscenity may be offensive; it is not per se harmful.[7] 394 U.S. at 567. Had the Court considered obscenity harmful as such, the

[6] "[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." 354 U.S. at 484.

[7] Non constant that a film which went beyond ordinary obscenity by exhorting sexual misconduct might be prohibited. Exhortation is not suggested in the case at bar.

fact that the defendant possessed it privately in his home would have been of no consequence.

In recognizing that public distribution differed from private consumption, the Court in *Stanley* gave two examples. In the case of public distribution, "obscene material might fall into the hands of children. . . . or . . . it might intrude upon the sensibilities or privacy of the general public." 394 U.S. at 567. To these examples, which were the extent of the Court's discussion, it can be said, equally with *Stanley*, "No such dangers are present in this case."

We confess that no oracle speaks to Karalexis unambiguously. Nonetheless, we think it probable that *Roth* remains intact only with respect to public distribution in the full sense, and that restricted distribution, adequately controlled, is no longer to be condemned. It is difficult to think that if Stanley has a constitutional right to view osbcene films, the Court would intend its exercise to be only at the expense of a criminal act on behalf of the only logical source, the professional supplier.[8] A constitutional right to receive a communication would seem meaningless if there were no coextensive right to make it. *Cf. Griswald* v. *Conneticut*, 1965, 381 U.S. 479. If a rich Stanley can view a film, or read a book, in his home, a poorer Stanley should be free to visit a protected theatre or library. We see no reason for saying he must go alone.[9]

So much for the probability of success. We do not agree with defendant's contention that there is no indication of irreparable injury. Even if money damages could be thought in some cases adequate compensation for delay, this defendant will presumably be immune. We agree with

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[8] It may be suggested that the supplier would run a particular risk, since the apprehended possessor of the film would, under *Stanley*, have no Fifth Amendment privilege to resist inquiry.

[9] For a further discussion of *Stanley* v. *Georgia*, *see* The Supreme Court, 1968 Term, 83 Harv. L. Rev. 7, 147-154 (1969).

plaintiffs that the box office receipts, if there is a substantial delay, can be expected to be smaller. A moving picture may well be a diminishing asset.[10] It has been said, also, that in assessing injury the chilling effect upon the freedom of expression of others is to be considered. *See Dombrowski v. Pfister*, 1965, 380 U.S. 479, 486-89.

This leads us to defendant's contention that we should, nevertheless, abstain until the Massachusetts Supreme Judicial Court has considered this question, since plaintiffs can raise it in their appeal from their Superior Court convictions. However, if our interpretation of *Stanley* is correct, we find it difficult to think the Massachusetts statute susceptible to a construction which would save it from overbroadness. Hence we must regard abstention as improper. *Zwickler v. Koota*, 1967, 389 U.S. 241. In the field where Congress has established a three-judge district court, abstention may still be warranted if there is a reasonable likelihood that the state court may construe its statute so as to avoid constitutional issues, but abstention is not appropriate simply to allow the state court to be the one to decide the statute's basic conflict with the federal constitution.[11]

We do understand, however, certain apprehensions voiced by the defendant. We note, accordingly, that this is a decision of probability, not a final holding that the Massachusetts statute is unconstitutional. Much less is it a decision

[10] The fact that plaintiffs are economically motivated is of no significance. *New York Times v. Sullivan*, 1964, 376 U.S. 254. In *Interstate Circuit, Inc. v. Dallas*, 1968, 390 U.S. 676 at 684, the Court spoke disapprovingly of the effect of the Dallas ordinance upon "one who wishes to convey his ideas through that medium [films], which of course includes one who is interested not so much in expression as in making money. . . ."

[11] There is an alternative possibility, that the Supreme Judicial Court would find the film not obscene. The Superior Court, in an elaborate opinion, has found otherwise. We are not moved by the thought that we should postpone permitting plaintiffs to exhibit their film on the ground that, after all, it is *not* obscene.

that one who distributes to children, or who creates a clear public nuisance, has standing to raise the contention that the statute is overbroad.[12] The preliminary injunction presently to issue will be restricted to, and conditioned upon, plaintiffs' adherence to the restrictions described earlier in this opinion. Nor do we consider the difference between the right to regulate conduct as distinguished from expression. *Cf. Derrington* v. *City of Portland, Or.* 2/26/69, *cert. denied* 38 L.W. 3170. Finally, we voice no opinion as to the legal consequences if plaintiffs exhibit their film under the protection of our injunction, and it is ultimately determined that our view was mistaken and that such exhibition was properly considered illicit.

Because of the importance of the matter, the injunction will not issue for one week, to permit plaintiffs to add other parties, if so advised, and to give the defendant the opportunity to apply to the Circuit Justice for a stay.

(s) BAILEY ALDRICH
BAILEY ALDRICH
U.S. Circuit Judge

(s) RAYMOND J. PETTINE
RAYMOND J. PETTINE
U.S. District Judge

[12] Normally standing is granted only when a defendant's own conduct is constitutionally protected. *United States* v. *Raines*, 1960, 362 U.S. 17. This rule has been relaxed in cases dealing with statutes affecting free expression. *See United States* v. *Raines*, *supra*, at 22 (dictum); *Thornhill* v. *Alabama*, 1940, 310 U.S. 88, 96-98; Sedler, Standing to Assert Constitutional Jus Tertii in the Supreme Court, 71 Yale L. J. 599 (1962). However, even where free speech is involved, it may be that standing should not be granted unless the defendant's conduct is at least *arguably* constitutionally privileged. *Cf. Brown* v. *Louisiana*; 1966, 383 U.S. 131, 143, 147-48 (concurring opinion of Mr. Justice Brennan); *Dennis* v. *United States*, 341 U.S. 494, 515-17. We do not reach such questions.

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[TITLE OMITTED]

Before ALDRICH, *Circuit Judge*
JULIAN and PETTINE, *District Judges*

DISSENTING OPINION

November 28, 1969

JULIAN, J. (dissenting)

I do not agree with the majority. The constitutionality of the Massachusetts criminal obscenity statute[1] is presently being litigated in the Massachusetts Courts. Pending final adjudication by the Supreme Judicial Court of the plaintiffs' appeal from their conviction in the Superior Court for violating that statute, this Court should abstain from taking further action in this case and should not interfere with the enforcement of the statute by the Commonwealth by enjoining its public officials from prosecuting the plaintiffs for additional violations of the statute should they persist in exhibiting the film while their conviction still stands.

It is my understanding that for the purpose of deciding the questions presently before us the Court assumes that the film involved in this litigation is in fact obscene within the meaning of the law. In fact, no evidence has been taken and no finding made on this issue by this Court. The Superior Court has found the film to be obscene.

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[1] Mass. G.L. c. 272, § 28A provides as follows:

"Whoever ... has in his possession ... any obscene ... print, picture, figure, image ... for the purpose of ... exhibition ... shall be punished ..."

The Massachusetts Court has construed this statute implicitly to require proof that the defendant *knowingly* has such material in his possession. *Demetropolos* v. *Commonwealth*, 1961, 342 Mass. 658.

The plaintiffs' reliance on *Stanley* v. *Georgia*, 394 U.S. 557 (1969), is untenable. The case before us is governed by *Roth* v. *United States*, 354 U.S. 476 (1957). The precise issue in *Roth* was the constitutionality under the First Amendment of two criminal obscenity statutes. One was a Federal statute (18 U.S.C. § 1461) which made it a crime for anyone to deposit for mailing and delivery obscene books, circulars or advertising. The other was a California statute (West's Ca. Penal Code Ann., 1955, § 311) which made it a crime for any person willfully and lewdly to keep for sale an obscene book or to publish an obscene advertisement of them. The Supreme Court held both statutes constitutional.

The Massachusetts statute before us is essentially the same as the two statutes upheld in *Roth* in that all three make the public distribution of obscene matter a criminal offense. This being so, it must follow as a matter of elementary logic that the Massachusetts statute is also constitutional.

The holding in *Roth* is still the law and is binding upon this Court. It has not been overruled by *Stanley* or any other case.

In *Stanley* the appellant was indicted, tried and convicted for "knowingly hav[ing] possession of ... obscene matter" in violation of a Georgia statute. The Georgia Supreme Court affirmed, holding it "not essential to an indictment charging one with possession of obscene matter that it be alleged that such possession was with 'intent to sell, expose or circulate the same.'" Appellant contended that the Georgia obscenity statute was unconstitutional insofar as it punishes mere private possession of obscene matter. The United States Supreme Court agreed and held that "the mere private possession of obscene matter cannot constitutionally be made a crime." The Supreme Court takes pains to distinguish the case before it from *Roth* and

similar cases in which *public commercial dissemination* of obscene material is involved.

The Court notes (p. 559) that the Georgia statute extended "further than the typical statute forbidding commercial sales of obscene material." It also notes (p. 559) that the "State and appellant both agree that the question here before us is 'whether a statute imposing criminal sanctions upon the mere [knowing] possession of obscene matter' is constitutional." The Court points out (pp. 560-561) that neither *Roth* nor any subsequent decision dealt with that question but "dealt with the power of the State and Federal Governments to prohibit or regulate certain *public* actions taken or intended to be taken with respect to obscene matter." (Emphasis supplied.)

And again at p. 567: "But that case [*Roth*] dealt with public distribution of obscene materials and such distribution is subject to different objections." In note 10 on the same page the Court makes reference to the Model Penal Code § 251.4 (American Law Institute, Proposed Official Draft, 1962) which would also make commercial dissemination of obscene matter a criminal offense. The Court concludes by stating (p. 568):

> "We hold that the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime. *Roth* and the cases following that decision are not impaired by today's holding. As we have said, the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home."

Thus the Supreme Court itself has declared in clear, unambiguous language that the holding in *Roth* has not been overruled by the decision in *Stanley* and is still the law.

Accordingly, on the authority of *Roth*, I would reject as wholly unjustified the plaintiffs' contention that the Mas-

sachusetts obscenity statute is unconstitutional on its face.

On the question of abstention the pertinent cases are *Dombrowski* v. *Pfister*, 1965, 380 U.S. 479,[2] and *Zwickler* v. *Koota*, 1967, 389 U.S. 241[3] In both those cases the statutes under attack were held to be overbroad and susceptible of sweeping and improper application and therefore justifiably attacked on their face as abridging expression protected by the First Amendment. Additionally, though threatened with prosecution, the petitioner in neither case was then in fact being prosecuted for violating the challenged statute and consequently its constitutionality was not being litigated in the State court. In *Dombrowski* there was the added element of bad faith on the part of the State prosecutor, an element certainly not present here. The Court accordingly held that abstention was not appropriate. Since the Massachusetts statute is not being justifiably attacked on its face as abridging free expression and since the case in the Massachusetts Court has been tried and decided and is now on appeal, it seems to me especially appropriate for this Court to abstain from proceeding to a declaratory adjudication of the constitutionality of the statute until the Supreme Judicial Court shall have heard and decided the appeal. The parties anticipate that this will happen within the next three or four months.

No injunction should issue against the defendant district attorney. He should be left free to prosecute these plaintiffs should they resume the exhibition of the film while their conviction in the Superior Court remains outstanding and their appeals pending.

The plaintiffs have failed to show the existence of the requisite grounds that would justify the issuance of a preliminary injunction:

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[2] The statute under attack was the Louisiana Subversive Activities and Communist Propaganda Control Law.

[3] The statute prohibited the distribution of anonymous handbills critical of political candidates.

(1) Since the statute is not unconstitutional on its face and the film is assumed by the Court to be obscene,[4] and has been found to be obscene by the Superior Court, the plaintiffs have failed to establish the probability that they will ultimately prevail in this litigation.

(2) There is no evidence before us that plaintiffs will suffer irreparable injury if they are prevented from showing the film until final disposition of their appeal. There has been no showing of the extent of the monetary loss, if any, that they will suffer if they are not allowed to show the film. We should not concern ourselves with the diminution in the value of the film if its showing is delayed for a substantial period of time. The film is not owned by the plaintiffs, but by Grove Press, Inc.,[5] which is not a party to this litigation. Furthermore, there is no evidence of the economic value of the film.

(3) The mere possibility that plaintiffs may be deprived of a constitutional right pending final determination of this case does not amount to the irreparable injury necessary to justify the issuance of the injunction.

Thus, in *Dombrowski v. Pfister*, 380 U.S. 479, 484-485, the Court states:

> "[T]he Court has recognized that federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework. It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to

[4] In its Memorandum of July 15, 1969, this Court said: "[T]he Court . . . will not consider now or at any other time the claim that the film is not obscene, as an evidentiary matter."

[5] The motion of Grove Press, Inc., to intervene as a party plaintiff was denied by the Court on July 15, 1969.

the irreparable injury necessary to justify a disruption of orderly state proceedings."

What the majority of this Court is doing today is without precedent. It is declaring that the public, commercialized dissemination of obscene matter to adults, regardless of how lewd and degenerate it may be, is protected expression under the First Amendment. I have found no authority for this proposition either in decided cases or in legislative enactments. On the contrary numerous statutes, both Federal and State, and a multitude of cases decided by the Supreme Court of the United States[6] and by other courts, Federal and State, have consistently denounced and punished as criminal the public, commercialized dissemination of obscene matter.

In my opinion the position taken by the majority of this Court is legally unsound and inimical to the public interest. I must therefore dissent.

(s) ANTHONY JULIAN
ANTHONY JULIAN
United States District
Judge

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[6] See, for example, the cases listed in *Stanley*, supra, notes 5 and 6, at page 561.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
[TITLE OMITTED]

ORDER ADDING PARTY

December 6, 1969

On motion of the plaintiffs, and without objection, the Honorable Robert H. Quinn, Attorney General of the Commonwealth of Massachusetts, is added as a party defendant.

By the Court,
(s) BAILEY ALDRICH
Circuit Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

December 6, 1969

INJUNCTION

[TITLE OMITTED]

This cause came on to be heard upon a motion for a preliminary injunction pending a decision on the merits, and after hearing, and upon the findings and rulings contained in the court's opinion of November 28, 1969, it is hereby ordered, adjudged and decreed as follows:

The defendants, their agents, servants and successors in office, shall not, until further order of this court, proceed against civilly or criminally, or otherwise interfere with, the plaintiffs Serafim Karalexis, James Vlamos, Symphony Cinema II, Inc. and Film Distributors, Inc. on account of the showing of a certain moving picture film entitled "I Am Curious (Yellow)." Provided, that this in-

junction shall not apply if the said picture is advertised in a manner pandering to a prurient interest in sex, or is shown to an audience not warned of its possibly offensive character, or is shown to children under the age of 18 years.

Provided, further, that the prosecution of proceedings connected with the appeal of the plaintiffs from a certain decision against them in the criminal side of the Suffolk Superior Court, short of ordering the execution of sentence or other penalties, is not hereby forbidden.

By the Court,
(s) Bailey Aldrich
(s) Raymond J. Pettine
District Judge

United States District Court
District of Massachusetts
[Title Omitted]

STAY PENDING APPEAL

December 6, 1969

On motion of the defendants the temporary injunction pending a decision on the merits entered this day is hereby stayed pending defendants' request to the Supreme Court for a stay pending their appeal from the issuance of said injunction.

By the Court,
(s) Bailey Aldrich
Circuit Judge

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1969

No.

GARRETT BYRNE, AS HE IS THE DULY ELECTED DISTRICT ATTORNEY FOR SUFFOLK COUNTY, CITY OF BOSTON, COMMONWEALTH OF MASSACHUSETTS,

PETITIONER,

v.

SERAFIM KARALEXIS, JAMES VLAMOS, SYMPHONY CINEMA II, INC., AND FILM DISTRIBUTORS, INC., ALL OF 252 HUNTINGTON AVENUE, BOSTON MASSACHUSETTS.

APPLICATION FOR STAY

[December 15 1969]

ORDER

The motion for a stay of the temporary injunction issued by the United States District Court for the District of Massachusetts presented to MR. JUSTICE BRENNAN, and by him referred to the Court, is granted pending the timely filing and disposition of an appeal.

Should such an appeal not be filed, this stay is to expire automatically. Should such an appeal be timely docketed, this stay is to continue pending the Court's action on the jurisdictional aspect of the case. In the event the appeal is dismissed or the judgment below is summarily affirmed, this stay is to expire automatically. Should the Court note probable jurisdiction of the appeal or postpone further consideration of the question of jurisdiction to the hearing on the merits, this stay is to remain in effect pending the issuance of the judgment of this Court.

MR. JUSTICE DOUGLAS, dissenting.

Respondents are the owners and operators of a motion

picture theatre which has been showing the film, "I Am Curious (Yellow)." On June 3, 1969, they were indicted by the Suffolk County Grand Jury for possessing with intent to exhibit an obscene film in violation of Mass. Gen. Laws, c. 272, § 28A. On June 17, 1969, respondents brought an action in the United States District Court for the District of Massachusetts to enjoin future prosecutions for the showing of "I Am Curious (Yellow)" and to declare that prosecution and the Massachusetts statute unconstitutional. On June 24, 1969, the three-judge District Court enjoined the prosecution on the ground that the indictments did not allege *scienter*. The indictments were then dismissed, and new indictments were thereafter returned. Respondent's request for a temporary injunction barring the second prosecution was denied by the District Court on July 15, 1969. The court stated that it would not consider a claim that the film was not obscene as an evidentiary matter, but invited the parties to submit briefs on the question whether the Massachusetts statute was unconstitutional on its face.

Respondents were convicted of the state obscenity offense on November 12, 1969. The applicant in this proceeding, the District Attorney for Suffolk County, has not agreed that respondents may exhibit the film pending the appeal of their convictions. On November 19, 1969, applicant moved the District Court to abstain from deciding the constitutionality of the Massachusetts statute, pending the resolution of that issue in the state courts. On November 28, 1969, the District Court, by a 2-1 vote, denied the motion and authorized a temporary injunction enjoining applicant from interfering with respondents as respects future showings of the film "I Am Curious (Yellow)," pending a final dispostion by the District Court on the merits.

Applicant now requests this Court to stay the temporary injunction which issued by the District Court.

The injunction issued by the District Court does not interfere in any way with the criminal conviction already obtained in the Massachusetts courts. That case will proceed unaffected by anything the federal court does, save for final execution of the state judgment. *Dombrowski v. Pfister*, 380 U.S. 479, is different. There we did not force petitioners to risk vindication of their constitutional rights in a state prosecution under an "overly broad" state statute. *Id.*, at 486. But in this case that risk was faced and resolution of the constitutional issues is being undertaken in the state courts. All that the federal court proposes is protection of respondents against repeated prosecutions, while both the state courts and the federal courts are resolving the constitutional issues. Enjoining one state prosecution, though perhaps permissible under *Ex parte Young*, 209 U.S. 123, would not be in keeping with more recent decisions. *Douglas* v. *Jeannette*, 319 U.S. 157. But I read the sparse record before us differently from MR. JUSTICE STEWART and believe that we deal here with threats of repeated prosecutions; and those threats seem to me to be no less ominous to the federal constitutional regime than the threatened harassment of union leaders in *Hague* v. *CIO*, 307 U.S. 496, who were asserting First Amendment rights in explaining the purposes of the new National Labor Relations Act. See the opinion of Mr. Justice Roberts and MR. JUSTICE BLACK, *id.*, at 504-506.

There may in time be a collision between the two systems for us to resolve. Meanwhile I would let the two orderly processes go ahead. For I can imagine no better and smoother accommodation of the needs of the two regimes than that designed by the District Court.

Underlying the state case and the federal case is an important First Amendment question. Some people think that "obscenity" is not protected by the Free Speech and Free Press Clauses of the First Amendment. They believe

that both Congress and the States can set up regimes of censorship to weed out "obscenity" from literature, movies, and other publications so as to rid the press of what they the judges deem to be beyond the pale.

I have consistently dissented from that course but not because, as frequently charged, I relish "obscenity." I have dissented before and now because I think the First Amendment bars all kinds of censorship. *Ginsberg* v. *New York*, 390 U.S. 629, 650 (DOUGLAS, J., dissenting); *Ginzberg* v. *United States*, 383 U.S. 463, 482 (DOUGLAS, J., dissenting); *Roth* v. *United States*, 354 U.S. 476, 508 (DOUGLAS, J., dissenting). To impose a regime of censors requires in my view, a constitutional amendment. "Obscenity" is no exception. "Obscenity" certainly was not an established exception to free speech and free press when the Bill of rights was adopted. See my concurring opinion in *Memoirs* v. *Massachusetts*, 383 U.S. 413, 428-433. It is a relatively new arrival on the American scene, propelled by dedicated zealots to cleanse all thought.

Prior to the Bill of Rights, state law, when it spoke of freedom of the press, meant only freedom from prior restraint. But an author or publishers could be held accountable for publishing what the state house thought was against "the public good". In other words, the First Amendment did not build on existing law; it broke with tradition, set a new standard, and exalted freedom of expression. There is no trace of a suggestion that "obscenity," however defined, was excepted.

That does not mean that "obscenity" is good or that it should be encouraged. It only means that we cannot be faithful to our constitutional mandate and allow any form or shadow of censorship over speech and press.[1]

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[1] John Hohenberg recently stated this First Amendment philosophy in a slightly different setting:

"As Aleksandr Solzhenitsyn wrote in bitter response to his re-

When our rewards go to people for thinking alike, it is no surprise that we become frightened at those who take exception to the current consensus. Then the hue and cry go up for censors; and that is the start of an ominous trend. What can be done to literature under the banner of "obscenity" can be done to other parts of the spectrum of ideas when party or majoritarian demands mount and propagandists start declaiming the law.

The "obscenity" issue raises large questions. To what extent may government watch over one's shoulder as he reads?

Judge Jerome Frank said in *Roth* v. *Goldman*, 172 F. 2d 788, 792:

> "I think that no sane man thinks socially dangerous the arousing of normal sexual desires. Consequently, if reading obscene books has merely that consequence, Congress, it would seem, can constitutionally no more suppress such books than it can prevent the mailing of many other objects such as perfumes, for example, which notoriously produce that result. But the constitutional power to suppress obscene publications might well exist if there were ample reason to believe that reading them conduces to socially harmful sexual conduct on the part of normal human beings. . . . Macaulay, replying to demands for suppression of obscene books, said: 'We find it difficult to believe that in a world so full of

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moval from the rolls of the Russion Writers' Union late in 1969 following the West's sympathetic reception of two of his novels that he could not have published in his own country: 'It is time to remember that the first thing we belong to is humanity. And humanity is separated from the animal world by thought and speech, and they should naturally be free. If they are fettered, we go back to being animals. Publicity and openness, honest and complete—that is the prime condition for the health of every society, and ours too.'

"Wherever freedom is denied, these words will live on." Saturday Review, December 13, 1969, pp. 70, 72.

temptations as this, any gentleman, whose life would have been virtuous if he had not read Aristophanes and Juvenal, will be made vicious by reading them.' Substitute 'Waggish Tales from the Czech'. for 'Aristophanes and Juvenal,' and those remarks become relevant here."

If "obscenity" can be carved out of the First Amendment, what other like exceptions can be created? Is "sacrilege" also beyond the pale? Are utterances or publications made with "malice" unprotected? How about "seditious" speech or articles? False, scandalous, and malicious writings or utterances against the Congress or the President "with intent to defame" or to bring them "into contempt or disrepute" or to "excite" against them "the hatred of the good people" or "to stir up sedition," or to "excite" people to "resist, oppose or defeat" any law were once made a crime. (1 Stat. 596-597.) Now that the First Amendment applies to the States, *Stromberg* v. *California*, 283 U.S. 359; *Near* v. *Minnesota*, 283 U.S. 697, may the States embark on such totalitarian controls over thought or over the press? May Congress do so?

We forget today that under our constitutional system neither Congress nor the States have any power to pass pass on the value, the propriety, the Americanism, the soundness of any idea or expression. It is that insulation from party or majoritarian control provided by the First Amendment—not our gross national product or mass production or pesticides or space ships or nuclear arsenal—that distinguishes our society from the other planetary regimes.

Opinion of MR. JUSTICE BLACK.

I agree completely with MR. JUSTICE DOUGLAS that state criminal punishment of these respondents for showing an allegedly "obscene" film is absolutely prohibited by the First and Fourteenth Amendments. That, however, does

not end for me the constitutional problems involved. In this case a Federal District Court stepped into the middle of a pending state criminal prosecution, rendered an opinion in effect deciding the fundamental constitutional issue in the state case, and enjoined the initiation of new prosecutions of these defendants or the execution of any sentence imposed on them in the pending state case. One of the fundamental aspects of our federal constitutional system requires that federal courts refrain from interfering in pending state criminal prosecutions except in highly unusual and very limited circumstances. I do not think the facts of this case present an occasion for departure from that general rule. It is for that reason alone that I agree with the Court's decision to stay the injunction issued by the Federal District Court against the State.

Opinion of MR. JUSTICE STEWART.

Without reaching the First and Fourteenth Amendment issues discussed by MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS, I join the Court's decision to stay the injunction for the reason indicated by MR. JUSTICE BLACK —*i.e.*, the general rule that "requires that federal courts refrain from interfering in pending state criminal prosecutions. . . ." This case does not now present the "highly unusual and very limited circumstances" that would justify a departure from that rule—such as would be presented by the threat or actuality of repetitive prosecutions for exhibition of the film in question.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[TITLE OMITTED]

SUPPLEMENTAL NOTICE OF APPEAL

Notice is hereby given that GARRETT BYRNE and ROBERT H. QUINN, defendants in the above entitled action, hereby appeal to the Supreme Court of the United States from the

orders of this Court, dated November 28, 1969, and December 6, 1969, enjoining the defendants from proceeding against the plaintiffs, civilly or criminally, on account of the showing of a certain motion picture film entitled "I Am Curious (Yellow)."

This appeal is taken pursuant to the provisions of 28 U.S.C. 1253.

GARRETT H. BYRNE
ROBERT H. QUINN
Defendants.
By their attorney:
JOSEPH J. HURLEY
First Assistant Attorney General
LAWRENCE P. COHEN
Assistant Attorney General.

GARRETT H. BYRNE,
District Attorney,
Suffolk County.
THEODORE A. GLYNN, JR.
Special Assistant District Attorney
Suffolk County

SUPREME COURT OF THE UNITED STATES
[TITLE OMITTED]

"The motion to vacate the order of this Court of December 15, 1969, is denied. MR. JUSTICE DOUGLAS is of the opinion that the motion should be granted. In this case (No. 1149) probable jurisdiction is noted. The case is placed on the summary calendar and set for argument immediately following No. 905."

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* In lieu of Robert H. Quinn, Attorney General.